under the policy? Clearly not, for the good and sufficient reason that no person can claim reparation or indemnity for the consequences of a criminal offence where his own wicked and deliberate intent is an essential ingredient in it...."

and he cited *Beresford* v. *Royal Insurance Co. Ltd.*, *supra*, and went on:

"This rule is not rested on an implied exception in the policy of insurance. It is based on the broad rule of public policy that no person can claim indemnity or reparation for his own wilful and culpable crime. He is under a disability precluding him from imposing a claim."

On the other hand the motor manslaughter cases are not within these classes of cases and public policy does not prevent the enforcement of an indemnity: see *Tinline* v. *White Cross Insurance Association Ltd.*[13] and *James* v. *British General Insurance Co. Ltd.*[14] The reason behind it seems to be that the act to be indemnified is one intended by law that people should insure against. The logical test is whether the person seeking indemnity is guilty of a deliberate, intended and unlawful violence or threats of violence. Road traffic cases, e.g., manslaughter on the road by gross negligence, negligent driving and the like are not wilful and culpable crimes which make them contrary to public policy to allow a person to be indemnified. In the circumstances, having carefully reviewed the question of public policy, I do not think it applies in this case.

I would dismiss the appeal with costs.

Wan Suleiman and **Syed Othman F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Rithauddeen & Aziz; Khoo & Sidhu.*

GOVERNMENT OF MALAYSIA & ORS. v. LOH WAI KONG

[F.C. (Suffian L.P., Raja Azlan Shah, Wan Suleiman, Chang Min Tat and Syed Othman F.JJ.) February 13, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 87 of 1978]

Constitutional Law — Personal liberty — Right of citizen to leave country and to travel overseas — Right to a passport — Federal Constitution, arts. 5 and 9.

Passport — Grant of passport — Discretion — Exercise of discretionary powers — Passport Act, 1966, s. 2.

Administrative Law — Discretion in granting passport — Government should not act mala fide or in other ways abuse its discretion.

The respondent had applied for an order directing the appellants to issue a Malaysian passport to him. He contended that he had a fundamental right to travel abroad and that the refusal of a passport violated this right. The learned Judge rejected the application (see [1978] 2 M.L.J. 175) but in the course of the judgment made certain observations on the law to which the appellants took objection. He held in effect that the refusal or delay in granting a passport was tantamount to preventing the appellant from leaving the country and was in violation of his right of personal liberty under article 5(1) of the Federal Constitution. The appellants appealed and the respondent cross-appealed.

Held: (1) personal liberty in article 5 of the Federal Constitution means liberty relating to or concerning the body of the individual; that Article does not confer on the citizen a fundamental right to leave the country. On the contrary the government may stop a person from leaving the country if, for instance, there are criminal charges pending against him;

(2) article 5 does not confer on the citizen a fundamental right to travel overseas;

(3) article 5 does not confer on the citizen a right to a passport. The government has a discretion whether to issue or not to issue, delay the issue of or withdraw a passport, for instance if criminal charges are pending against the applicant. The exercise of this discretion is subject to review by a court of law, as in the case of other discretionary powers.

Cases referred to:-

(1) *A.K. Gopalan* v. *State* A.I.R. 1950 S.C. 27.

(2) *Rex* v. *Brailsford* [1905] K.B. 730.

(3) *Satwant Singh Sawhney* v. *D. Ramarathnam* A.I.R. 1967 S.C. 1836, 1840, 1843.

The following cases were also referred to: *Public Prosecutor* v. *Musa* [1970] 1 M.L.J. 103; *Assa Singh* v. *Menteri Besar, Johore* [1969] 2 M.L.J. 45; *Joyce* v. *Deputy Public Prosecutor* [1946] A.C. 370; *Koon Hoi Chow* v. *Pretam Singh* [1972] 1 M.L.J. 180, 182; *Datuk Haji Harun bin Haji Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 165; *Public Prosecutor* v. *Su Lian Yu* [1976] 2 M.L.J. 131; *Kent* v. *Dulles* (1958) 2 Law Ed. 1204.

FEDERAL COURT.

Lim Beng Choon (Senior Federal Counsel) for the appellants.

Jag-Jit Singh for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): Mr. Loh Wai Kong ("applicant" but before us respondent) was a student in Australia and in January 1966 married. On April, 1975, he left Australia to come back home and, because he had been granted a Resident Visa entitling him to live permanently in Australia, his Malaysian passport was endorsed by the Australian Government with an Authority to Return valid for three years from that date.

On August 2, 1976, he was charged in court in Ipoh with criminal offences. His passport was surrendered to court as a condition of bail.

On March 2, 1977, his passport expired and on June 9 that year it was returned to him at his request. If it was his intention to go overseas, the passport would not have helped, because no airline would accept a passenger without a valid passport.

On a date that is uncertain (but nothing turns on this) he applied for a new passport.

It was important that he should get it and quickly so that with it he could travel to Australia and there show the Australian Government the expired passport stamped with the Authority to Return to Australia, and request them to stamp the new passport also with an Authority to Return — which must be done before April 25, 1978, the date of the expiry of the old Authority.

Our Immigration Department refused to issue the applicant a new passport. The criminal charges were still pending.

There was correspondence between them and the applicant's solicitors, who eventually were told by letter of February 3, 1978, that the reason for so refusing was because the issue of a passport was within the Royal prerogative of His Majesty the Yang Dipertuan Agung. At the hearing Immigration gave

evidence that in fact the application was refused because the applicant was involved in criminal cases and that the Police had asked them to hold on until after the disposal of those cases, that the applicant had been put on the suspect list on June 29, 1976, and that the Police had informed Immigration Headquarters on December 23, 1977.

On March 2, 1978, the applicant by Originating Motion applied to the High Court in Penang for an order directing the Government of Malaysia as first respondent, the Minister of Home Affairs as second respondent, the Head of Immigration, Penang, as third respondent, and the Passport Officer, Penang, as fourth respondent, to issue the applicant a passport.

He then contended that:

(1) he had a fundamental right to travel abroad, and

(2) the refusal of a passport violated this right.

The learned judge rejected the application but in the course of his judgment made certain observations on the law of which the Government took objection; hence this appeal. There is also a cross-appeal. It is convenient to take both appeal and cross-appeal together.

It was argued on behalf of the Government that:

(1) the learned judge erred in law in holding that the expression "personal liberty" in article 5 of the Constitution included the right of a person, whether a citizen or non-citizen of Malaysia, to enter or leave the country whenever he desired to do so;

(2) the learned judge erred in law and/or in fact in holding that the refusal or withdrawal of a person's passport should be considered in the light of whether or not there was a violation of the right of personal liberty under article 5;

(3) the learned judge erred in law and in fact in holding that the refusal or delay in granting the applicant a passport was tantamount to preventing him from leaving the country and was a restraint on his person;

(4) the learned judge erred in law and/or in fact in holding that the power to issue or refuse to issue and the power to withdraw a passport was subject to review by a court of law by virtue of section 44(1) of the Specific Relief Act, 1950.

Mr. Jag-Jit Singh who appeared on behalf of the applicant before us did not advance all the arguments advanced before the learned judge. He said that the right to travel overseas was distinct from the right to a passport. He conceded that the citizen did not have an absolute right to a passport; that for instance a person of bad character might be denied a passport; that even a passport holder had no right to travel abroad, if, for instance, he had not paid his income tax, or he was a drug trafficker or there were security reasons for not allowing him to go abroad. He conceded that article 5 was meant for people wrongfully detained; but maintained that if a citizen was of good character and was not likely to bring the country into disrepute, he had a qualified right to travel overseas; that though qualified, this was nevertheless a right; that in deciding whether or not to issue a passport Immigration should exercise their discretion properly . He contended that in this case they had not exercised their discretion at all and that instead they had simply acted at the behest of the Police, and that if Immigration had not said the refusal was in exercise of the Royal prerogative and had instead frankly said that it was because of the pending criminal charges, the applicant would not have taken the Government to court; and that if this court was against the applicant we should make no order as to costs.

Mr. Jag-Jit Singh did not say, as was said in the written notice of cross-appeal, that the learned judge should have ordered Government to issue the applicant a passport pending the disposal of the criminal proceedings against him.

The first three arguments advanced on behalf of Government involve the construction of article 5 and may be taken together. That article reads:

"(1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority: Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdaka Day.

(5) Clauses (3) and (4) do not apply to an enemy alien."

It is convenient here to reproduce also the words of article 9 which are as follows:

"(1) No citizen shall be banished or excluded from the Federation.

(2) Subject to Clause (3), and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

(3) So long as under the Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence."

These three arguments raise the following issue: does a citizen have a right to leave the country, to travel overseas, and a right to a passport?

Article 5(1) speaks of personal liberty, not of liberty *simpliciter*. Does personal liberty include the three liberties? It is well-settled that the meaning of words used in any portion of a statute — and the same principle applies to a constitution — depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing "personal liberty" in article 5(1) one

must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being "unlawfully detained"; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the *person* or *body* of the individual, and do not, in our judgment, include the right to travel overseas and to a passport. Indeed freedom of movement is dealt with specifically in article 9 which, however, only guarantees the citizen (but not the non-citizen) the right to enter Malaysia, and, subject to the special immigration laws applying in Sabah and Sarawak and to other exceptions set out therein, to move freely within the Federation and to reside anywhere therein. With respect, we agree with what Mukherjee J. said at page 96 in *Gopalan*[1]:

"In ordinary language, 'personal liberty' means liberty relating to or concerning the person or body of the individual, and 'personal liberty' in this sense is the antithesis of physical restraint or coercion. According to Dicey, who is an acknowledged authority on the subject, 'personal liberty' means a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification: vide Dicey on Constitutional Law, Edition 9. pages 207, 208. It is, in my opinion, this negative right of not being subjected to any form of physical restraint or coercion that constitutes the essence of personal liberty."

While the constitution by article 9 expressly gives the citizen, subject to the limitations set out therein, freedom to move freely within the country and to reside anywhere in it, it is silent as to the citizen's right to leave the country, travel overseas and have a passport for that purpose, and accordingly, in our judgment, the citizen has no constitutional right to leave the country and travel overseas. Indeed, as to the latter how can the constitution guarantee a right to be enjoyed outside the jurisdiction? The right to travel to foreign countries does not exist in international law but is governed by treaties, conventions, agreements and usage of different kinds, and it would be presumptuous and futile of our constitution-makers to confer a *fundamental* right which every foreign country may lawfully reject.

Does a citizen have a fundamental right to leave the country with or without a passport? In our judgment no such right is guaranteed by the constitution and Mr. Jag-Jit Singh was with respect correct in saying that in certain circumstances the Government has power to stop a citizen (or indeed even a non-citizen) from leaving; certainly when, as in this case, there is a criminal charge pending against him. It is impossible and undesirable to catalogue the other circumstances in which the Government may stop a person from leaving, and each case will have to be considered in the light of its own facts.

As to the right to a passport, what is a passport? In England, it is, according to Lord Alverstone C.J. at page 745 in *Rex* v. *Brailsford*[2] —

"... a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named.

Passports have been known and recognized as official documents for more than three centuries, and in the event of war become documents which may be necessary for the protection of the bearer, if the subject of a neutral State, as against the officials of the belligerents, and in time of peace in some countries, as in Russia, they are required to be carried by all travellers."

The nature of a Malaysian passport is the same. It is a document issued in the name of His Majesty the Yang Dipertuan Agung on the responsibility of the Minister of Home Affairs to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a Malaysian citizen in foreign countries, and it depends for its validity upon the fact that the Minister in an official document vouches the respectability of the person named.

In India, it has been held by the Supreme Court in *Satwant Singh Sawhney* v. *D. Ramarathnam*[3] that the citizen has a right to a passport and to refuse him one violates article 21, which corresponds to our article 5. Three of the judges (the majority led by Subba Rao C.J.) held, as accurately summarized in the headnote, that —

"Right to travel abroad is fundamental right. Since there is no law regulating or depriving a person of such a right, refusal to give passport or withdrawal of one given violates Arts. 21 and 14. The reasons are:

(1) Theoretical possibility of exit from India for foreign travel is expressly restricted by executive instructions to shipping and airlines companies and by refusal of foreign exchange. An Indian passport is factually a necessary condition for travel abroad and without it no person residing in India can travel outside India. The Indian Government, by refusing a passport to a person residing in India, completely prevents him from travelling abroad.

(2) The expression 'personal liberty' in Art. 21 takes in the right of locomotion and to travel abroad, but the right to move throughout the territories of India is not covered by it inasmuch as it is specially provided in Art. 19. Under Art. 21 no person can be deprived of his right to travel except according to procedure established by law.

(3) The doctrine of equality before the law is necessary corollary to the high concept of the rule of law accepted by Constitution of India. One of the aspects of rule of law is that every executive action, if it is to operate to the prejudice of any person, must be supported by some legislative authority. Secondly, such a law would be void, if it discriminates or enables an authority to discriminate between persons without just classification. What a Legislature could not do, the executive could not obviously do. Arbitrary prevention of a person from travelling abroad will certainly affect him prejudicially. A person may like to go abroad for many reasons. He may like to see the world, to study abroad, to undergo medical treatment, to collaborate in scientific research, to develop his mental horizon in different fields and such others. Executive arbitrariness can prevent one from doing so and permit another to travel merely for pleasure. While in the case of enacted law one knows where he stands, in the case of unchannelled arbitrary discretion, discrimination is writ large on the face of it. Such a discretion patently violates the doctrine of equality, for the difference in the treatment of persons rests solely on the arbitrary selection of the executive. The argument that the said discretionary power of the State is a political or a diplomatic one does not make it anytheless an executive power."

The minority of two led by Hidayatullah J., as he then was, held that on the contrary a citizen had no fundamental right to travel abroad and to a pass-

port but that he is only ordinarily entitled to a passport. The minority decision is accurately summarized in the headnote as follows:

"A person is ordinarily entitled to a passport unless, for reasons which can be established to the satisfaction of the court, the passport can be validly refused to him. Since an aggrieved party can always ask for mandamus, if he is treated unfairly, it is not open, by straining the Constitution, to create an absolute and fundamental right to a passport where none exists in the Constitution. There is no doubt a fundamental right to equality in the matter of grant of passport (subject to reasonable classification) but there is no fundamental right to travel abroad or to the grant of passport. A passport is a political document. The solution of a law of passport will not make things better. Even if a law were to be made the position would hardly change because the utmost discretion will have to be allowed to decide upon the worth of an applicant. Where the passport authority is proved to be wrong, mandamus will always set right the matter."

We have already expressed the view that a citizen has no fundamental right to leave the country and travel abroad, and here we would say that in our view he does not have a right, not even a qualified right, to a passport, though we must further add that in our view, though the citizen does not have a right under our constitution and our law to a passport, the Government should act fairly and *bona fide* when considering applications for a new passport or for the renewal of a passport and should, like Government in the United Kingdom, rarely refuse to grant them.

As already stated, by issuing a passport to a citizen, the Minister of Home Affairs vouches the respectability of the holder to foreign governments who would be dismayed if they find themselves lumbered with Malaysians who are drug-traffickers and other criminals. It is obvious that before the Minister places in the hands of a citizen a document which pledges the honour of the country, the Government is entitled to scrutinize the credentials of such a person. Since Government pledges its honour, the issue of a passport is, in our judgment, only a privilege which can be exercised with the concurrence of the executive; it is not a right. The executive cannot be compelled to grant a document pledging its honour to any and every person and to vouch for the respectability of every one wishing to go abroad. The Executive has a discretion whether or not to issue a passport.

In this connection it is interesting to note the practice in England. According to *Wade and Philips* in Constitutional and Administrative Law, 9th edition, page 416:

"The prerogative power to refuse, withdraw or revoke passports is in practice only exercised in a limited number of situations. A passport may be denied (a) to a person for whom an arrest warrant has been issued in the United Kingdom, (b) to a person who has been repatriated at the public expense, until the debt is paid, and (c) to a minor in certain circumstances, such as where a journey is known to be contrary to parental wishes, and (d) on grounds of public interest, to a person whose past or present activities are demonstrably undesirable. Passports may also be denied to certain categories of persons supporting the Smith regime in Rhodesia; such cases are reviewed by an advisory committee."

As regards the question raised by the Government's fourth ground of appeal, as to whether the Executive's power to issue or not to issue and the power to withdraw a passport is subject to review by a court of law under section 44(1) of the Specific Relief Act, 1950 — in our judgment when exercising this discretionary power the Executive is expected to behave in the same way as when exercising its other discretionary powers. It must act *bona fide*, fairly, honestly and honourably, and if it does not, the aggrieved party will probably make a noise in the press, in Parliament and in public. What if he comes to court? If it is established that Government has acted *mala fide* or has in other ways abused this discretionary power, the court may, in our judgment, review Government's action and make the appropriate order, and the principles which the court will apply are well-established and may be found in two authoritative books: *Administrative Law* by Professor H.W.R. Wade, and *Judicial Review of Administrative Action* by the late Professor de Smith.

To sum up, "personal liberty" in article 5 means liberty relating to or concerning the person or body of the individual; that article does not confer on the citizen a fundamental right to leave the country. On the contrary, the Government may stop a person from leaving the country if, for instance, there are criminal charges pending against him. Article 5 does not confer on the citizen a fundamental right to travel overseas.

Article 5 does not confer on the citizen a right to a passport. The Government has a discretion whether or not to issue, delay the issue of or withdraw a passport: for instance, if criminal charges are pending against the applicant. The exercise of this discretionary power is subject to review by a court of law. Only a citizen may apply for a passport.

Only a citizen has the right to enter the country.

The appeal is accordingly allowed and cross-appeal dismissed.

As regards costs here and below, they shall be paid by the applicant. It is unrealistic to think that he had been misled by Immigration's letter of February 3, 1978. Criminal charges had then been pending against him for 18 months, from as early as August 2, 1976, and he must have known that it was because of these that he had not been given a new passport.

Appeal allowed and cross-appeal dismissed.

Solicitors: *Jag-Jit Singh & Co.*